Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 77-1100

In the

Supreme Court of the United States

OCTOBER TERM, 1977

GEORGE E. SANGMEISTER, et al.,

Plaintiff-Appellees,

vs.

CLARA HARTLEY WOODARD, County Clerk of Will County, Illinois,

Defendant,

THE STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS,

Intervening Defendant-Appellant.

— Consolidated With —

WILLIAM WALSH,

Plaintiff-Appellee,

vs.

THE BOARD OF ELECTION COMMISSIONERS OF CHICAGO, et al.,

Defendants,

ILLINOIS ASSOCIATION OF COUNTY CLERKS AND RECORDERS,

Intervening Defendant.

On Appeal from the United States Court of Appeal for the Seventh Circuit

MOTION TO DISMISS OR AFFIRM

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Appellee William Walsh moves this Court, pursuant to Rule 16(1)(a) of the Rules of the Supreme Court, to dismiss the appeal herein for lack of jurisdiction because not taken in conformity with statute or, in the alternative, to affirm the judgment sought to be reviewed on the ground that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

I. THE APPEAL WAS NOT TAKEN IN CONFORMITY WITH STATUTE.

Appellant State Board of Elections for the State of Illinois has appealed the decision of the United States Court of Appeals for the Seventh Circuit. That decision affirmed in part, and reversed and remanded in part the decision of the United States District Court for the Northern District of Illinois. In the District Court case, Appellee William Walsh, and other plaintiffs, argued that the defendant State officials, who had been given the authority to decide the position of candidates on electoral ballots, and who had consistently used their power to grant top position on the ballots to members of their own political parties, had by their systematic, discriminatory official conduct violated the plaintiffs' Fourteenth Amendment right to Equal Protection of the Laws. The district court, sitting without a jury, found in favor of the plaintiffs, and ordered a precinct-by-precinct rotation of the ballot positions of Democratic and Republican candidates. Jurisdictional Statement at 18a-27a

On appeal, the United States Court of Appeals affirmed the district court's finding on the unconstitutionality of the defendants' conduct, but vacated the district court's

order for precinct-by-precinct rotation. Jurisdictional Statement at 15a. The case was remanded to the district court with directions to enter an order that the defendants devise a constitutional method of ballot placement which would be neutral in character. Jurisdictional Statement at 14a-15a. The County Clerks were not to be prohibited or discouraged from experimenting with different procedures from election to election. Jurisdictional Statement at 14a-15a.

Appellant State Board of Election Commissioners contends that the basis of the Court's jurisdiction to hear the appeal from the decision of the Seventh Circuit is furnished by 28 U.S.C. §1254(2), which provides for Supreme Court review:

> "By appeal by a party relying on a State statute held by a [United States] court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, . . ."

This statute does not confer jurisdiction on this Court to hear this appeal, because no State statute was held by the Seventh Circuit, in the case below, to be repugnant to the Constitution, treaties or laws of the United States. The Seventh Circuit specifically held that it was the practice of the defendants which was unconstitutional. Jurisdictional Statement at 12a. This unconstitutional practice was not required by any State statute.

The only mention to a State statute in the opinion of the Seventh Circuit below is the Court's reference to the testimony of two county clerks that their practice was permissible under Ill. Rev. Stat., Ch. 46, §16-3, which gives to the authorities charged with the printing of ballots the additional authority to determine ballot place-

ments. Jurisdictional Statement at 5a. This is also the only State statute mentioned in Appellant's Jurisdictional Statement. Jurisdictional Statement at 3. Appellant never explains how the validity of this statute was attacked. Instead, Appellant talks broadly of "Illinois law and practice" (Jurisdictional Statement at 6), "Illinois election practices" (Jurisdictional Statement at 6), and "state administrative action" (Jurisdictional Statement at 8). Appellant at one point argues that, ". . . Illinois should be allowed to conduct its elections in accordance with the procedures set forth by the Illinois General Assembly." Jurisdictional Statement at 8. However, the only procedure set up by the General Assembly was the delegation to certain officials, by statute, of the authority to determine ballot placement. The decision of the Seventh Circuit did not change this statutory delegation of authority in any way. The only effect of the decision appealed from herein was to require State officials to act in a Constitutional manner. Since no state statute was held unconstitutional by the Seventh Circuit, in the decision appealed from herein, the Supreme Court does not have jurisdiction to hear an appeal of this case under 28 U.S.C. §1254(2).

II. THE QUESTIONS ON WHICH THIS CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

In the event that this Court decides that it has jurisdiction to hear this case under 28 U.S.C. §1254(2), Appellee moves, pursuant to Supreme Court Rule 16 (1)(c), that the judgment of the Seventh Circuit in this case be affirmed on the ground that it manifests that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The appeal of this case is based solely on the contention that the Seventh Circuit erred below in upholding the district court's finding of fact that denial of top position in general elections harmed the party denied such a position. Jurisdictional Statement at 6-9. This court has consistently held that findings of fact concurred in by two courts below will not be reviewed in the absence of very obvious and exceptional error. *Grover Tank Manufacturing Company* v. *Linde Air Products Company*, 336 U.S. 271, 275 (1949) *and cases cited therein.* A fair reading of the opinion of the Seventh Circuit in the case below will reveal that its concurrence with the District Court's finding of fact on this issue did not and could not constitute very obvious and exceptional error. On the contrary, this finding found substantial support in the record. See Jurisdictional Statement at 8a-10a. Since this appeal is based solely on an allegedly erroneous finding of fact concurred in by the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit, and since there has been no very obvious or exceptional showing of error with respect to this finding, the Judgment of the Court of Appeals for the Seventh Circuit should be affirmed without further review of this Court.

Respectfully submitted,

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